Filed 1/11/10 P. .v Davis CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DESMOND DEON DAVIS, Defendant and Appellant.	B205660 (Los Angeles County Super. Ct. No. TA071233)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victoria M. Chavez, Judge. Modified and, as modified, affirmed with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Desmond Deon Davis appeals from the judgment entered following his plea of no contest to count 1 – second degree murder (Pen. Code, § 187, subd. (a)) with an admission that he personally used a firearm (Pen. Code, § 12022.5, subd. (a)), and following his plea of no contest to count 2 – attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)).[1] The court sentenced appellant to prison for 15 years to life on count 1 plus three years for the firearm enhancement with, as to count 2, a concurrent term of life with the possibility of parole. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

The record reflects that on August 4, 2003, Yolanda Reliford was driving a car near Willowbrook and Greenleaf. Rufus Moore and Patrick Williams were passengers. Appellant drove a vehicle in front of Reliford's car, blocking it. Appellant and an accomplice, gang members, exited the vehicle which appellant had been driving. Using AK-47 assault rifles, appellant and his accomplice shot at Reliford, Moore, and Williams, killing Reliford.

CONTENTIONS

Appellant claims (1) the trial court erroneously failed to advise him prior to his no contest pleas that he would be on parole for life,[2] and (2) the Penal Code section 1202.4, subdivision (b) restitution fine and Penal Code section 1202.45 parole revocation fine must each be reduced to $200.

DISCUSSION

1. *The Trial Court Did Not Prejudicially Err by Failing to Advise Appellant that He Would Be On Parole for Life.*

a. *Pertinent Facts.*

The information alleged as count 1 that appellant committed second degree murder as to Reliford, and alleged as to counts 2 and 3, that appellant committed

---

[1] See footnote 3, *post*.

[2] Appellant raises this claim in a supplemental opening brief.

attempted willful, deliberate, and premeditated murder as to Moore and Williams, respectively. The information alleged as to all counts that a principal personally used a firearm (Pen. Code, § 12022.53, former subds. (b) & (e)(1)), a principal personally and intentionally discharged a firearm (Pen. Code, § 12022.53, former subds. (c) & (e)(1)), and appellant committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). The information also alleged as to count 1 that a principal personally and intentionally discharged a firearm causing great bodily injury and death (Pen. Code, § 12022.53, former subds. (d) & (e)(1)). Appellant pled not guilty, the case was tried before a jury, and appellant was represented by retained counsel.

On June 14, 2004, during jury deliberations, the jury advised the court that they were deadlocked as to all counts. The court declared a mistrial. The foreperson informed the court that 10 jurors had voted to convict and two had voted to acquit.

On October 21, 2004, the court indicated it had been informed by appellant's counsel that the parties had reached a disposition. The court indicated appellant would plead guilty or no contest "to the charges in count 1 as murder in the second degree" and "count 2," "the attempt murder, and it would be the attempted willful, premeditated murder charge." The court also indicated appellant would admit weapon use under Penal Code section 12022.5, subdivision (a), which would carry a three-year term, and the sentences on counts 1 and 2 would be served concurrently.

The court then stated, "And that would result in an aggregate total commitment of 18 to life -- 15 to life on the second-degree murder, . . . plus three consecutive for the weapon use for 18 to life, concurrent or at the same time as a life commitment on count 2." The court asked appellant, "[i]s that what you understand?" and appellant replied yes.

During the taking of the plea, the court advised appellant that both counts were strikes and that if he committed another felony, it would be a third strike. Appellant indicated he had had enough time to talk about this with his counsel and understand the consequences. After appellant waived his constitutional rights, the court advised him that

the consequences of his change in plea were that he would be going to prison for the period, and pleading to the strikes, that the court had discussed with appellant.

The court then stated, "[n]ow, it's possible that you will be released on parole at some point in the future. If you are that means that you would be on a conditional release into the community. It won't be for a period of time." The court asked if appellant understood, and appellant replied yes.

Appellant denied the court had made promises other than those discussed, or that threats had been made, to get appellant to change his plea. Appellant indicated he was "taking advantage of this deal because under the circumstances, knowing basically the evidence that the People have against [appellant]," he thought it was in his best interest to do so. The court did not, during the advisements prior to the taking of the pleas, advise appellant that one of the consequences of his pleas would be that he would be on parole for the rest of his life.

Appellant pled no contest to second degree murder (count 1) and admitted a Penal Code section 12022.5 enhancement allegation. The court later asked, "And to the charge in count 2, a violation of Penal Code section 664 and 187, attempted murder, how do you now plead?" Appellant replied "[n]o contest."[3] Appellant's counsel stipulated to a factual basis "pursuant to *People* [*v.*] *West*." The court accepted the pleas.

---

[3] The October 21, 2004 minute order indicates, as to count 2, that appellant pled no contest to attempted murder, and does not expressly refer to "attempted willful, deliberate, and premeditated murder." Moreover, in the above colloquy pertaining to count 2, the court referred to "attempted murder," asked appellant how he pled, and appellant replied no contest. Nonetheless, we have indicated that, as to count 2, appellant pled no contest to attempted *willful, deliberate, and premeditated* murder (see page 2). This is because count 2 alleged attempted willful, deliberate, and premeditated murder, and appellant pled no contest to count 2. Moreover, earlier during the taking of the negotiated plea, the court indicated that, as to count 2, appellant would plead guilty or no contest to "the attempt murder, *and it would be the attempted willful, premeditated murder charge*." (Italics added.) Further, appellant's April 22, 2005 sentence on count 2, discussed *infra*, was a concurrent "life commitment." We note the sentence for attempted willful, deliberate, and premeditated murder is life with the possibility of parole (Pen. Code, § 664, subd. (a)), while the sentence for unpremeditated attempted murder is five, seven, or nine years in prison. (*Ibid*.) We also note the April 22, 2005

In February 2005, appellant retained new counsel. On March 24, 2005, appellant filed a motion to set aside his plea. The motion asserted, inter alia, that appellant was not advised of the consequences of his plea. In the motion's statement of facts, appellant's counsel stated appellant's prior counsel did not explain what appellant was pleading to, and appellant did not understand the consequences of his plea. Appellant's counsel also stated that appellant's codefendant had been convicted and sentenced to prison for 90 years to life.

In his supporting declaration, appellant claimed he was innocent of the charges, his prior counsel and his mother had pressured appellant to plead, appellant's mother told appellant that his prior counsel asked her to convince appellant to take the deal or he would go to prison for the rest of his life, and his prior counsel told him that his prior counsel did not want to try the case twice.

Appellant also said his prior counsel told appellant that the court would punish appellant by sentencing him to a long prison term if appellant tried the case and lost, appellant did not understand that he was pleading to two life sentences, he thought he would be released in 15 years, and he pled because he was afraid and relied on poor and incomplete advice from his prior counsel. Appellant said he wanted to go to trial.

Appellant did not, in his declaration, and appellant's newly-retained counsel did not, anywhere else in the written motion, specifically assert that appellant was not advised that a consequence of his plea was that he would be on parole for the rest of his life. The People opposed appellant's motion.

At the April 22, 2005 hearing on appellant's motion, appellant acknowledged he was facing a prison sentence of 90 years to life if he had been convicted absent his negotiated plea. Appellant's counsel argued this was "basically [appellant's] first time

---

minute order indicates as to count 2 that "the court selects the term prescribed by law of life imprisonment with the possibility of parole as to count 2," the term to run concurrently. We further note the abstract of judgment reflects, as to count 2, that appellant was convicted of attempted murder, but reflects appellant's sentence on count 2 as life with the possibility of parole.

through," and appellant lacked regular experience with, the criminal justice system,[4] and appellant had been confused.

The trial court stated, "The defendant was explained to very clearly by both his attorney and by me what he was facing and what he was going to be getting. His co-defendant, who was convicted in his joint trial, did get 90 years to life plus multiple life terms given the seriousness and the charges. And the evidence against this defendant was strong. [¶] I heard the case, and I think that the disposition that was proposed was certainly a reasonable one, and it . . . does indeed give the defendant the opportunity to have a release date. It's 18 to life with a concurrent life term.

"He, as a practical matter, . . . may be eligible for parole in about 15 years. I know the 15-year number popped up in his declaration and also in the moving papers, and I'm certain that's something that his attorney explained to him. [¶] But I think it was very clear to him what he was doing, and he had ample opportunity to speak with his attorney and his mother before making the decision to take the plea at the time that the matter was set for pretrial. [¶] I don't think good cause has been established to show any of the statutory bases for setting aside the plea. So I'm going to respectfully deny that request."

The court sentenced appellant to prison for 15 years to life on count 1 plus three years for the firearm enhancement with, as to count 2, a concurrent term of life with the possibility of parole. After the court imposed restitution and parole revocation fines, the court stated that appellant might be eligible for parole at some point in the future, "[a]nd at that time, if you're placed on parole, it will probably be lifetime parole." Appellant did not comment on the court's above quoted statement.

---

[4] The probation report reflects appellant suffered three sustained juvenile petitions from 2001 to 2002 (two for petty theft, and one for disturbing the peace). In July 2003, he was arrested for, and in September 2003, he pled guilty to, driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). As mentioned, the present offenses occurred in August 2003.

b. *Analysis.*

Appellant claims the trial court erroneously failed to advise him prior to his no contest pleas that he would be on parole for life. For the reasons discussed below, we conclude no prejudicial error occurred.

During the taking of a plea, a trial court must advise a defendant, if true, that one of the consequences of the defendant's plea is that, once released from prison, the defendant potentially could remain on parole for life. (*In re Moser* (1993) 6 Cal.4th 342, 345, 347, 351-352 (*Moser*).) Because appellant was sentenced to prison for 15 years to life for second degree murder as to count 1, he potentially could have remained on parole for life. (*Id*. at p. 347; Pen. Code, § 3000.1, subd. (a).[5]) The trial court erred by failing to so advise appellant during the taking of the pleas.

However, even though the trial court erroneously failed to advise appellant about the above parole consequence, he is not entitled to reversal of the judgment absent a demonstration of prejudice, i.e., but for the error, appellant would not have pled no contest. (*Moser*, *supra*, 6 Cal.4th at pp. 345, 352.)

In the present case, appellant barely escaped conviction by the earlier hung jury which had been presented with the current and related allegations. At the time of the pleas, appellant indicated he had spoken with his prior counsel and understood the consequences of appellant's pleas. The court at one point told appellant it was "possible" he would be released on parole. Appellant indicated he was pleading no contest because he knew what the People's evidence against him was, and because pleading no contest was in appellant's best interests.

Appellant did not, in his declaration supporting his motion to withdraw his pleas, specifically state that, but for the trial court's error in failing to advise appellant about the parole consequence at issue here, he would not have entered his pleas. He made no

---

[5] Penal Code section 3000.1, subdivision (a), states, "In the case of any inmate sentenced under Section 1168 for any offense of . . . second degree murder with a maximum term of life imprisonment, the period of parole, if parole is granted, shall be the remainder of the inmate's life."

reference in his motion to the fact that he had not received an advisement that he could be on parole for life. He said his mother told him he would go prison for the rest of his life if he did not plead. Appellant acknowledged he faced a maximum sentence of 90 years to life if he had not pled no contest. The court which heard appellant's motion to set aside his pleas indicated the evidence of appellant's guilt was strong and the negotiated disposition was reasonable. After the court sentenced appellant, the court indicated that if appellant were placed on parole, it would probably be lifetime parole. Appellant raised no issue at that time. We conclude appellant has failed to demonstrate that the erroneous failure by the trial court to advise him about the lifetime parole consequence was prejudicial.

2. *The Restitution Fine and Parole Revocation Fine Must Each Be Reduced.*

On October 21, 2004, during the taking of the negotiated plea in this case, the court advised appellant that it would impose a minimum $200 restitution fine.[6] On April 22, 2005, the court (the same judge presiding) sentenced appellant, and the sentence included a $500 Penal Code section 1202.4, subdivision (b) restitution fine, plus an imposed and stayed $500 Penal Code section 1202.45 parole revocation fine.

Respondent concedes the Penal Code section 1202.4, subdivision (b) restitution fine and Penal Code section 1202.45 parole revocation fine must each be reduced to $200. We accept the concession (*People v. Walker* (1991) 54 Cal.3d 1013, 1018-1019, 1024-1027, fn. 3, 1028-1030) and we will modify the judgment accordingly.

---

[6] The trial court did not, during the taking of the plea, advise appellant of his rights under Penal Code section 1192.5.

DISPOSITION

The judgment is modified by reducing the amount of the Penal Code section 1202.4, subdivision (b) restitution fine to a total of $200, and by reducing the amount of the Penal Code section 1202.45 parole revocation fine to a total of $200, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.